Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

WILLIAM J. ZISK AND JOHN W. ZISK,

Petitioners,

v.

DONALD R. ZISK

Respondent.

On Petition For Writ Of Certiorari To The State Of California Court Of Appeal For The Third District

---

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED FOR REVIEW

Whether a state court may deprive a citizen of the United States of life, liberty, or property, without due process of law; nor make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws; or prohibit the free exercise thereof or abridge the freedom of speech or the right of the people to petition the government for a redress of grievances, repugnant to the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Whether a judge may deprive an interested party from a due process right to be heard during the probate of the estate of his biological mother, repugnant to the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

Whether a personal representative and his attorney may deprive an interested party of due process of law and equal protection of the laws, during the probate of the estate of his biological mother, through breach of fiduciary duty, abuse of limited authority without court supervision, extrinsec fraud in concealment and misrepresenting the facts in disposition of estate property, failure to provide special notice to the objectors to the proceedings, fraud on the court in the record on appeal, failure to timely file an inventory and appraisal of estate property, and unauthorized subordinations to mortgages and construction loans on estate property well in excess of $1,375,000.00 without court supervision, repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States.

LIST OF ALL PARTIES

The caption of the case in this court contains the names of all parties to the proceedings in the State of California Court of Appeal, for the Third Appellate District. There is no parent corporations or publicly held company that owns 10% or more of corporate stock.

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CITATIONS TO OPINIONS BELOW

The opinion of the State of California Court of Appeals, for the Third Appellate District was filed on November 27, 2002 whose memorandum is here sought to be reviewed is unreported and is printed in Appendix A, pages 1 - 11

The California Third District Court of Appeal denied a petition for rehearing on December 24, 2002 and is printed in appendix B, pages 12 - 13

The California Supreme Court denied a petition for review on February 11, 2003 and is printed in Appendix C, page 14

The remittitur to trial court clerk was issued on February 20, 2003 and is printed in Appendix D, pages 15 - 17

The Supreme Court Docket Entry Appendix E page 18

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the State of California Court of Appeals, for the Third Appellate District, whose opinion is here sought to be reviewed is unreported and was entered on November 27, 2002.

The California Third District Court of Appeals denied a petition for rehearing on December 24, 2002.

The Supreme Court of the State of California denied a petition for review on February 11, 2003.

The jurisdiction of the United States Supreme Court does not depend on weather the state court addressed the federal questions. It is enough that the federal claims were made and not accepted. (*Lynk m. La Porte Superior Court No.* 2, 789 F.2d 554 (7th Cir. 1986). Furthermore, when the California Supreme Court denies a Petition for Review, it is to be assumed that the court has been given fair opportunity to review the merits of the petitioners' claim, for purposes of exhaustion of state court remedies (*Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990). The issues have been raised, preserved, and passed upon by the California Supreme Court.

Petitioners believe USCA Title 28, section 1257 (a) confers on this Court jurisdiction to review on a writ of certiorari the judgment in question, whose opinion is here sought to be reviewed.

USCA Title 28, section 1257 (a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statue of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where

any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

RELEVANT CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or other wise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners seek review of a state court judgment. At the outset of the proceedings in the court of first instance, petitioner objected to the appointment of respondent as executor of the estate of Mary A. Zisk and as a result of his conflict of interest concealment, misrepresentation, extrinsec fraud, deceit and breach of fiduciary duty, petitioners were not aware of his violations of due process of law and equal applications of the laws. The court of first instance ignored or overruled petitioners participation in the proceedings and completely deprived William J. Zisk of the ability to speak at the noticed July 17, 2001 probate hearing.

Petitioners first raised the federal questions sought to be reviewed on petition for rehearing before the California Third District Court of Appeal. The Appellate Court denied the petition for rehearing on December 24, 2002.

The questions sought to be reviewed were raised in a petition for review of decision of the Court of Appeal for the Third Appellate District by the Supreme Court of the State of California. The California Supreme Court denied a petition for review on February 11, 2003. The pertinent specific portions of the record follows.

Note: To avoid unnecessary confusions, RT and CT in parentheses denote Recorders Transcripts and Clerks Transcripts respectively.

On September 8, 1994, Mary A. Zisk died testate in Roseville, California at the age of 82. On October 28, 1994, Donald R. Zisk petitioned the probate court in Auburn, California, Placer Superior Court No. SPR-0567, for probate of Lost Will or Probate of Will and for Letters Testamentary and to be appointed Executor with full authority to administer under the Independent Administration of Estates Act. Respondent estimated the character and estimated value of estate property to be personal property at approximately

$140,000.00. (CT 1-15) Notice of hearing on respondents petition was set to be heard on November 22, 1994 at 8:30 a.m. in Department 3 of Placer County Superior Court in Auburn, California. (CT 23-34)

On November 17, 1994, pursuant to Probate Code, section 10452, appellant William J. Zisk filed written objections requesting denial to respondent Donald R. Zisks' requested full authority to administer the estate of Mary A. Zisk under the Independent Administration of Estates Act. (CT 39-42) Appellant further objected to respondents request that a copy of the decedents alleged Lost Will and codicils, if any, be admitted to probate, including the alleged proof of holographic instrument. Appellant claims the signature of Mary A. Zisk bears little resemblance to the signature on the purported copy of the Lost Will, dated August 3, 1989, presented for probate by respondent. Appellant directed his objections to respondents conflict of interest in ongoing litigation involving the 106 High Street, Higganum, Connecticut intestate estate of William W. Zisk, in which respondent Donald R. Zisk, Mary A. Zisk, Edward J. Zisk, Marion A. Krivanec and appellant William J. Zisk are all named parties to the pending and ongoing litigation in the State of Connecticut, which has not reached a dispositive conclusion as of February 1, 2002. Appellant also objected to respondents estimated value of the estate to be personal property valued at $140,000.00, with no indication as to the contents of the inventory or its whereabouts. Appellant further requested, pursuant to Evidence Code section 452 et. seq., the court take judicial notice of the records of the California probate file of William W. Zisk, *Placer County Superior Court No. 12063*, secretly filed by Mary A. Zisk during 1969 without notice or participation to any of the legal heirs to the intestate estate of William W. Zisk, alleging to be the sole heir to the entire intestate estate, wherever situated. (CT 39-42)

On November 17, 1994, appellant William J. Zisk filed a Request for Special Notice on all matters listed in Probate

Code section 1250(c) in the matter of the *Estate of Mary A. Zisk*, Placer Superior Court No. SPR-0567. (CT 36-38)

On November 17, 1994, objector, Marion A. Krivanec filed a Request for Special Notice on all matters listed in Probate Code section 1250(c) in the matter of the Estate of Mary A. Zisk, Placer Superior Court No. SPR-0567. (CT43-45)

On November 17, 1994, Marion A. Krivanec filed written objections, pursuant to Probate Code section, 10452, to respondents request to administer the Estate of Mary A. Zisk under the Independent Administration of Estates Act. The objections were very similar to the objections of William J. Zisk, noting respondents conflict of interest in the failure of Mary A. Zisk to distribute the Intestate Estate of William W. Zisk to the legal children heirs to the *subject property* located at 106 High Street, Higganum, Connecticut, and the erroneous secret processing of probate proceedings in California courts instead of Connecticut courts of proper jurisdiction, and including the ability of respondent to take many actions without obtaining court approval and unilateral authority to execute terms as he sees fit, and the disbelief of the purported copy of a Lost Will, and that the purported witnesses to Mary A. Zisk's signing the purported August 3, 1989 Lost Will and the contents of that Will should be questioned under oath, and the purported signature of Mary A. Zisk on the copy of the Lost Will does not appear as the one that Marion A. Krivanec is familiar with. (CT 48-49)

On November 22, 1994 at 8:30 a.m. in Department 3, of Placer County Superior Court a hearing was held before the Honorable J. Richard Cousens in the matter of the *Estate of Mary A. Zisk*, case Number SPR-0567 (RT 1-3). During the hearing, respondents attorney, Tosh Yamamoto, acknowledged objectors William J. Zisk and Marion A. Krivanec objections on the record and agreed to *"serve under very limited authority if he will give prior notice and etcetera"*. (RT p. 2 L. 2-4)

Mr. Yamamoto:

> "And if that's the case what I'm asking this time, if they have again no objection I'd like to have my client appointed as a *special administrator*, you know, pending trial of the matter. Again, *it would be without any type of independent authority*" (RT 2 L. 23-26)

The Court stated:

> "At this time I'm going to grant the petition and appoint the petitioner *special administrator* with Will annexed with *limited authority* so that the estate can proceed" (RT 2, 3 - L. 27, 28, 1)

Judge J. Richard Cousens signed the order for probate, dated November 22, 1994, appointing personal representative Donald R. Zisk as *Special Administrator with general powers*. *Limited authority* is granted to administer the estate under the Independent Administration of Estates Act "(*there is no authority, without court supervision, to (1) sell or exchange real property or (2) grant an option to purchase real property or (3) borrow money with the loan secured by an encumbrance upon real property*)". Bond is not required. (CT 47)

On December 6, 1994, Judge J. Richard Couzens signed the order for probate, appointing Donald R. Zisk as *Special Administrator with general powers* and with *Limited Authority*. The Petition for Probate of Lost Will or Probate of

Will and for Letters Testamentary and Authorization to Administer Under the Independent Administration of Estates Act is continued to January 24, 1995 at 8:30 a.m. in Department 3 of the Placer County Superior Court. (CT 50, 51)

On December 14, 1994, *Letters of Special Administration* were issued to respondent Donald R. Zisk appointing him *Special Administrator of decedent's estate with the powers of a general administrator with limited authority (no authority, without court supervision, to (1) sell or exchange real property or (2) grant an option to purchase real property or (3) borrow money with the loan secured by an encumbrance upon real property*). The affirmation was executed on November 22, 1994 in Sacramento, CA by respondent Donald R. Zisk as an individual stating:

> "*I solemnly affirm that I will perform the duties of personal representative according to law*". (CT 52)

On December 15, 1994, on the Court's own motion and good cause appearing, Judge James L. Roeder issued notice in the matter of the Estate of Mary A. Zisk, action No. SPR 0567, that the above entitled matter set for hearing on January 24, 1995 is hereby reset for hearing on February 7, 1995 at 8:30 a.m. in Department No. 2. (CT 53)

On December 21, 1994, respondents' attorney, Tosh G. Yamamoto, appears to have filed a proof of subscribing witness in the matter of the *Estate of Mary A. Zisk*, Placer Superior No. SPR-0567, without providing any notice or proof of service to any of the named parties to this action, or persons requiring Special Notice. The instrument declares under penalty of perjury that the signature of V. Eldora Ford appears as one of the attesting witnesses to the instrument of which attachment 1 is a photographic copy and stating:

"I have examined attachment 1 and my signature is on it".

Appellants are unable to locate the purported signature of V. Eldora Ford as a purported attesting witness to the purported Lost Will of Mary A. Zisk purportedly executed on August 3, 1989 at Sacramento, California. (CT 57-59)

On January 17, 1995, Appellant William J. Zisk filed Notice of Motion and Motion for Continuance and for Full Disclosure of Decedent's Alleged Estate; Declaration of William J. Zisk in Support, with hearing set for February 7, 1995 at 8:30 a.m. in Department 2 of Placer County Superior Court. The grounds for the motion are based upon the inclusion of documents creeping into the Court file by surprise, without proof of service or Special Notice to anyone, and that a complete disclosure of the alleged Estate of Mary A. Zisk is a prerequisite of due process. Appellant made it unequivocally clear to all interested parties and the court, that there was no objection to administering the estate, per se, unless the alleged estate included the Connecticut property. (CT 60-65)

On February 7, 1995 in Placer County Superior Court, the following proceedings were had, to wit:

AUBURN, CALIFORNIA

FEBRUARY 7, 1995

--oOo--

In the matter of MARY A. ZISK, Decedent, Case Number SPR-0567, came on regularly this day before the Honorable JAMES D. GARBOLINO, Judge of the

Superior Court of the State of California, County of Placer, Department Number Two thereof.

The DECEDENT was represented by TOSH YAMAMOTO, Attorney at Law acting as counsel.

An OBJECTOR, MARION A. KRIVANEC, was in personal attendance upon the Court.

An OBJECTOR, WILLIAM J. ZISK, was in personal attendance upon the Court.

The following proceedings were had, to wit:

--oOo--

" THE COURT: The matter of Mary Zisk. This is a petition for probate of Will and Issuance of Letters?

MR. YAMAMOTO: Yes your Honor.

Tosh Yamamoto appearing in this matter, your Honor.

And also, two of the children are present, who have previously filed Objections. William J. Zisk and Marion A Krivanec are both present, your Honor.

In their Prayer they had objected to my client serving them with full authority under the Independent Estate Act.

I spoke with my client, and he's agreeable to dropping that request, and serving them with *limited authority*.

And, I believe, they're agreeable to that.

THE COURT: Agreeable?

You have an Order?

MR. YAMAMOTO: No.

I'll submit one.

THE COURT: Submit an Order and submit a copy to the Objectors.

MR. YAMAMOTO: Correct, your Honor.

THE COURT: Yes, Mr. Zisk?

MR. ZISK: Your Honor, I would also like to present a copy of the Petition on Judicial Notice in my motion. If I could give it to the Clerk?

THE COURT: You want to file something?

MR. ZISK: Yes. I would like to have her file this, and keep it in the file.

THE COURT: What is it?

MR. ZISK: It's a copy of the Petition for the -- for the property back on the East Coast. That's involved in this, and has a definite, direct bearing on the circumstances of my mother's estates.

THE COURT: Mr. Yamamoto?

MR. YAMAMOTO: Your Honor, I know something about it.

Basically, we would have no objections to the gentleman lodging it with the Court.

THE COURT: Fine. Go ahead.

Why don't you give it to the Bailiff.

MR. YAMAMOTO: We have no objection to lodging it with the Court.

Basically, Mr. Zisk here had filed a lawsuit back East in regards to the sale of a

piece of real property, which his father and mother both had an interest in it. And there was a part -- somewhat of a partition action is my understanding.

He had lost at the trial level, and he lost at the appellate level. And he's -- now, he's brought a Writ of Certiorari Application in Pro Per before the Supreme Court of the United States. And this is the Application for Writ of Certiorari.

So, I've no objection to it being lodged with the Court.

We have no objection to the Court taking Judicial Notice; and no objection to it being lodged.

MR. ZISK: Your Honor, it's in regards to my Motion to Compel the Full Disclosure of the Estate of my Mother. I would like to have that matter clarified, also.

MR. YAMAMOTO: Your Honor, in that regard the only thing we can disclose at this time is what I filed with the Court. He indicated that I did not file certain things, the proof of the witnesses; and I did forward that to him.

But as far as the inventory of things, we will now inventory. Now that the client has been appointed, we can go ahead and file our inventory within 90 days. And they'll be supplied with a copy within 90 days. And they'll be supplied with a copy of that.

Other than an accounting -- an accounting is not due. We just started the Administration of the Estate.

MR. ZISK: It's not a matter of

accounting. I want full disclosure. I want to have a full understanding of what part of the Connecticut property is involved in the estate. I have no way of knowing what constitutes the estate. And this is my concern I don't have any problem --

THE COURT: He's got 90 days to file an Inventory and Appraisal. And at that point in time -- if you don't think that it's complete, then at that point you make your objections.

MR. ZISK: Well, nothing will proceed before that time then, your Honor?

THE COURT: No.

You'll get notice.

Have you made a request for Special Notice?

MR. YAMAMOTO: They have, your Honor; and we acknowledged that.

MR. ZISK: Thank you very much.

MR. YAMAMOTO: Thank you, your Honor.

THE COURT: Thank you

(Proceedings adjourned.)

(RT 4-7)

Appellant, William J. Zisk relied on the oral proceedings had during the February 7, 1995 hearing before Judge Garbolino, to wit:

" THE COURT: *He's got 90 days to file an inventory and appraisal. And at that point in time - - if you don't think that it's complete, then at that point you make your objections.*

MR. ZISK: *Well, nothing will proceed before that time then, your Honor?*

THE COURT: *No. You'll get notice. Have you a request for special notice?*

MR. YAMAMOTO: *They have, your honor; and we acknowledged that.*

MR. YAMAMOTO: Thank you, your honor.

THE COURT: Thank you.
(proceedings adjourned.) " (RT 7 L. 13-27)

From this point in time, *appellant did not receive any contact, special notice or correspondence from respondent or his attorney, Tosh G. Yamamoto during the course of the following five years.* In fact, a cursory review of the Reporters Transcript of the February 7, 1995 hearing before Judge Garbolino, verifies that the word, *Executor, was not mentioned during the entire course of the oral proceedings held on that date.* (RT 4-7) The Probate Minutes in reference to the February 7, 1995 hearing before Judge Garbolino *are not supported by and are in direct conflict with the Reporters Transcript of the same hearing date.* (CT 66) (RT 4-7)

On March 23, 1995, a Probate Order was filed, referring to the February 7, 1995 hearing before Judge Garbolino, *under signature of David L. Allen, which had crept into the court file without proof of service to anyone or approval of objectors Marion A. Krivanec or William J. Zisk as ordered by Judge Garbolino during the February 7, 1995 hearing.* (RT 5 L. 8-9) The purported Order for Probate purports to appoint respondent Donald R. Zisk *Executor*, with *limited authority*, of the decedents purported 8/3/89 Lost Will, as set forth in attachment "1". Appellants have no idea who David L. Allen is or how an order for probate under his signature, dated March 22, 1995, had crept into the court files of the Matter of the *Estate of Mary A. Zisk.* (CT 67-69)

On March 30, 1995, *without providing any knowledge or Special Notice to objectors Marion A. Krivanec or William J. Zisk, and without court supervision from the Placer County Superior Court in Auburn, California*, respondent Donald R. Zisk, individually and purportedly as Executor of the Estate of Mary A. Zisk and Edward J. Zisk purportedly executed a *Mortgage Extension Agreement* relating to the purported Mortgage Deed and promissory Note for $183,333.32, which was purportedly executed between purported mortgagor High Street Associates, of 1783 Saybrook Road, Haddam, Connecticut 06438 and purported mortgagees Donald R. Zisk, Edward J. Zisk and the deceased, Mary A. Zisk on May 23, 1991 and found in Volume 180, page 238 of the land records of the Town of Haddam, Connecticut. The purported *Mortgage Extension Agreement* purportedly extends the payment of the principal sum of $183,333.32 from the due date of May 23, 1996 to May 23, 2001. The purported agreement was executed by respondent Donald R. Zisk, individually and purportedly as Executor of the Estate of Mary A. Zisk on March 10, 1995 at Roseville, County of Placer, State of California, and Edward J. Zisk on March 14, 1995 at Pearl River, Parish of Saint Tammany, State of Louisiana, and Steven A Rocco on March 30, 1995, at Middletown, County of Middlesex, State of Connecticut, and Recorded on June 28, 1995 in Volume 202, pages 679-681 of the land records of the Town of Haddam, County of Middlesex, State of Connecticut. (CT 149-152)

While appellant William J. Zisk continued to wait for respondent to file an inventory and appraisal, with the clear understanding from Judge Garbolino at the February 7, 1995 hearing that *nothing would proceed before that time*, it appears that on April 5, 1995, two additional orders for probate had crept into the court file without the knowledge or prior approval or prior special notice to objectors Marion A. Krivanec and William J. Zisk. (CT 72-77) The April 5, 1995 order for probate was signed by Judge Garbolino and was identical to the one signed by David L. Allen and filed

on March 23, 1995. All three orders for probate appear to appoint respondent Donald R. Zisk as *Executor*, with *limited authority*, of the decedent's 8/3/89 purported Lost Will, as set forth in attachment "1". (CT 67-69) (CT 72-77) All three orders for probate are contrary to and contradictive of the Reporters' Transcript of the proceedings held before Judge Garbolino on February 7, 1995 (RT 4-7) (CT 81-88)

During the February 7, 1995 hearing there was no discussion on a petition for probate of Lost Will or granting of issuance of letters. Respondent attorney, Tosh G. Yamamoto acknowledged the presence of objectors Marion A. Krivanec and William J. Zisk in the courtroom and in their prayer to continue, expressing their objections to respondent serving them with full authority under the Independent Estate Act. Mr. Yamamoto stated:

> *" I spoke with my client, and he's agreeable to dropping that request, and serving them with limited authority.*
>
> *And, I believe, they're agreeable to that.*
>
> THE COURT: *Agreeable?*
>
> *You have an Order?*
>
> MR. YAMAMOTO: *No.*
>
> *I'll submit one.*
>
> THE COURT: *Submit an Order and submit a copy to the Objectors.*
>
> MR. YAMAMOTO: *Correct, your Honor."*
>
> (RT 4-5 L. 28, 1-10) (CT 83, 84)

Appellant has stated above, from the conclusion of the proceedings had before Judge Garbolino on February 7, 1995, appellant *William J. Zisk did not receive any contact,*

special notice or correspondence of any kind, including proof of service, from respondent or his attorney, Tosh G. Yamamoto during the course of the following five years.

On June 16, 1995, *without providing any knowledge or special notice to objectors Marion A. Krivanec or William J. Zisk and without the court supervision of the Placer County Superior Court in Auburn, California*, respondent Donald R. Zisk, Individually and purportedly as Executor of the Estate of Mary A. Zisk and Edward J. Zisk executed a *partial release* of the purported Mortgage Deed and $183,333.32 Promissory Note purportedly executed between purported mortgagor High Street Associates and purported mortgagees Donald R. Zisk, Edward J. Zisk and the deceased, Mary A. Zisk, on May 23, 1991 and found in Volume 180, page 238 of the land records of the Town of Haddam, County of Middlesex, State of Connecticut. The purpose of the *partial release* was to enable developer Steven A. Rocco and Jonathan Gottlieb to acquire an additional $106,600.00 mortgage and loan on a two acre portion of the 32 acre *subject property*, on which includes the original Zisk family home and found in Volume 202 page 651 of the land records of the Town of Haddam, in the State of Connecticut. (CT 133)

On October 17, 1996, while acting under limited authority, and without providing any knowledge or special notice to objectors MARION A. KRIVANEC, or WILLIAM J. ZISK, and without the required court supervision of the Placer County Superior Court in Auburn, California, respondent DONALD R. ZISK, individually and purportedly as Executor of the ESTATE OF MARY A. ZISK and with EDWARD J. ZISK executed a SUBORDINATION AGREEMENT on the 32 acre Zisk family estate in Connecticut, in favor of WALKLEY HEIGHTS ASSOCIATES of 1783 Saybrook Road, Haddam, Connecticut, to wit:

" SUBORDINATION AGREEMENT

WHEREAS, WALKLEY HEIGHTS

ASSOCIATES, a Connecticut general partnership having its principal place of business at 1783 Saybrook Road, Haddam, Connecticut 06438, is desirous of obtaining from FARMERS & MECHANICS BANK, a Connecticut corporation having its principal office located at 237 Main Street, Middletown, Connecticut a loan of ONE MILLION TWENTY FIVE THOUSAND and 00/100 ($1,025,000.00) DOLLARS upon a note secured by a mortgage of premises owned by WALKLEY HEIGHTS ASSOCIATES situated at High Street, Haddam, Connecticut; and

WHEREAS, said premises are presently encumbered by a mortgage from HIGH ST. ASSOCIATES in favor of MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK dated May 23, 1991 and recorded June 3, 1991 in the Haddam Land Records in Volume 180 at Page 238 and which mortgage was modified by Mortgage Extension Agreement dated March 30, 1995 and recorded June 28, 1995 at Volume 202 Page 679 of the Haddam Land Records; and

WHEREAS, said premises will be or have been conveyed from HIGH ST. ASSOCIATES to WALKLEY HEIGHTS ASSOCIATES, subject to said mortgage; and

WHEREAS, FARMERS & MECHANICS BANK will only make said loan if said loan is secured by a first mortgage on said premises; and

WHEREAS, in order to induce FARMERS & MECHANICS BANK to make said loan EDWARD J. ZISK and DONALD

R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK are willing to waive priority of said mortgage from said HIGH ST. ASSOCIATES to MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK.

NOW THEREFORE, in order that said loan may be made and may be secured by a first mortgage on said premises, EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK do hereby agree for themselves and their heirs, successors and assigns to and with FARMERS & MECHANICS BANK to waive and surrender to said FARMERS & MECHANICS BANK, its successors and assigns, such right or priority as they the said EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK, have or ought to have by virtue of the above described mortgage and do hereby covenant and agree that said new mortgage from WALKLEY HEIGHTS ASSOCIATES shall take precedence over said mortgage and shall be entitled to the same rights and privileges, both in law and in equity, as it would have had if it had been executed, delivered and recorded prior to said mortgage. "

Said *subordination agreement*, dated October 17, 1996 is found in Volume 209, page 605 of the land records of the Town of Haddam, County of Middlesex, in the State of Connecticut. (CT 133)

On October 17, 1996, *while acting under limited authority, and without providing any knowledge or special notice to objectors Marion A. Krivanec, or William J. Zisk, and*

without the required court supervision of the Placer County Superior Court in Auburn, California, respondent Donald R. Zisk, individually and purportedly as executor of the Estate of Mary A. Zisk, and with Edward J. Zisk executed an additional *SUBORDINATION AGREEMENT* pertaining to the 32 acre Zisk family intestate estate located at 106 High Street, Higganum, Connecticut, to wit:

" SUBORDINATION AGREEMENT

WHEREAS, WALKLEY HEIGHTS ASSOCIATES, a Connecticut general partnership having its principal place of business at 1783 Saybrook Road, Haddam Connecticut 06438, is desirous of obtaining from FARMERS & MECHANICS BANK, a Connecticut corporation having its principal office located at 237 Main Street, Middletown, Connecticut a loan of THREE HUNDRED FIFTY FIVE THOUSAND and 00/100 ($355,000.00) DOLLARS upon a note (s) secured by a mortgage of premises owned by WALKLEY HEIGHTS ASSOCIATES situated at High Street Haddam, Connecticut; and

WHEREAS, said premises are presently encumbered by a mortgage from HIGH ST. ASSOCIATES in favor of MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK dated May 23, 1991 and recorded June 3, 1991 in the Haddam Land Records in Volume 180 at Page 238 and which mortgage was modified by Mortgage Extension Agreement dated March 30, 1995 and recorded June 28, 1995 at Volume 202 Page 679 of the Haddam Land Records; and

WHEREAS, said premises will be or

have been conveyed from HIGH ST. ASSOCIATES to WALKLEY HEIGHTS ASSOCIATES, subject to said mortgage; and

WHEREAS, FARMERS & MECHANICS BANK will only make said loan if said loan is secured by a second mortgage on said premises; and

WHEREAS, in order to induce FARMERS & MECHANICS BANK to make said loan EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK are willing to waive priority of said mortgage from said HIGH ST. ASSOCIATES to MARY A. ZISK, EDWARD J. ZISK and DONALD R. ZISK.

NOW THEREFORE, in order that said loan may be made and may be secured by a second mortgage on said premises, EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK do hereby agree for themselves and there heirs, successors and assigns to and with FARMERS & MECHANICS BANK to waive and surrender to said FARMERS & MECHANICS BANK, its successors and assigns, such right or priority as they the said EDWARD J. ZISK and DONALD R. ZISK, individually and as Executor of the ESTATE OF MARY A. ZISK, have or ought to have by virtue of the above described mortgage and do hereby covenant and agree that said new mortgage from WALKLEY HEIGHTS ASSOCIATES shall take precedence over said mortgage and shall be entitled to the same rights and privileges, both in law and in equity, as it would have had if it had been

executed, delivered and recorded prior to said mortgage. "

Said *subordination agreement*, dated October 17, 1996 is found in Volume 209, page 674 of the land records of the Town of Haddam, County of Middlesex, in the State of Connecticut. (CT 133)

On June 9, 1998, appellant, William J. Zisk, through his attorney, Charles W. Snow Jr. in the State of Connecticut, filed a Quiet Title action complaint, Middlesex County Superior Court Case No. CV 98 0086079S, *William J. Zisk v. Walkley Heights Associates*. (CT 131-138) The purpose of this action is to quiet the title to the *subject property* located at 106 High Street, Higganum, Connecticut, alleged owned by the parties. On July 8, 1998, a notice of LIS PENDENS was recorded at the Town Clerk's Office in Haddam, Connecticut and found in Volume 218, page 375 of the land records of the Town of Haddam, Connecticut. (CT 139, 140) The case title as set forth above is returnable on July 14, 1998 in the Judicial District of Middlesex at Middletown, Connecticut, in which William J. Zisk of 205 Thomas Street, Roseville, California is the plaintiff and Walkley Heights Associates of 1783 Saybrook Road, Haddam, Connecticut is the defendant.

The allegations of the complaint claims that William J. Zisk has an interest in the *subject property* that comes about by being an heir of the intestate estate of William W. Zisk and Mary A. Zisk who acquired the *subject property* on December 3, 1943 and found in Volume 67, page 469 of the Haddam Land Records. The complaint further alleges that Mary A. Zisk died on September 8, 1994, a resident of Roseville, California and that no executor had been appointed for her estate as shown in a probate order signed by Judge J. Richard Couzens on December 6, 1994 in the probate of the Estate of Mary A. Zisk in Placer County Superior Court, Case No. SPR-0567 at Auburn, California. (CT 137-138).

Even though no executor had been appointed to her estate Donald R. Zisk signed the following documents as her purported Executor:

> " a. Mortgage extension agreement as found in Volume 202, page 679 of the Haddam Land Records.
>
> b. Subordination agreement subordinating the mortgage held by Mary A. Zisk, et al to a mortgage given by the Farmers & Mechanics Savings Bank, dated October 17, 1996 and recorded in Volume 209, page 605 of the Haddam Land Records.
>
> c. A partial release of mortgage dated June 16, 1995 and recorded in Volume 202, page 651 of the Haddam Land Records.
>
> d. A subordination agreement dated October 17, 1996 and found in Volume 209, page 674 of the Haddam Land Records." (CT 133)

The complaint further alleges that on June 24, 1974, Mary A. Zisk, who on this date now held title to the subject property, executed her Last Will and Testament and in the fourth paragraph of said Will specifically described the 4 acre portion of the subject property to be given by herself and her now deceased husband, William W. Zisk, over to William J. Zisk and further describes said premises in her Will. (CT 136)

The complaint further alleges in paragraphs 10, 11 and 12 as follows, to wit:

> " 10. The Defendant, Steven A. Rocco, purports to have an interest in said property as a result of a Warrantee Deed from Mary A. Zisk, Donald R. Zisk and Edward J. Zisk, over to High Street Associates, a 10/12

interest dated May 8, 1991 and recorded in Volume 180, Page 230 of the Haddam Land Records.

11. The Defendant, High Street Associates, also purports to have a further added interest in said premises as a result of a Committee Deed, dated September 20, 1994 and recorded in Volume 199, Page 885 of the Haddam Land Records.

12. The entity known as High Street Associates, which purported to have an interest in said property as a result of a Warrantee Deed as referred to above, did not exist at the time of said transfer, dated May 8th, 1991 and therefore all subsequent transfers from the alleged High Street Associates are null and void. " (CT 136)

On June 5, 2001, in the Matter of the *Estate of Mary A. Zisk*, Placer County Superior Court Case No. S-PR-567, on the court's own motion, the Honorable James D. Garbolino issued an ORDER TO SHOW CAUSE AND NOTICE OF HEARING, setting the hearing for June 26, 2001 at 8:30 a.m. in Department 2. The order stated as follows:

" YOU ARE ORDERED to personally appear at the time and place set forth above and to show cause to this court then and there, why the Inventory and Appraisal, has not or should not be filed. This was to have been filed within 90 days from the court hearing of February 7, 1995 " (CT 89, 90)

On June 20, 2001, respondent Donald R. Zisk, through his attorney, Tosh G. Yamamoto, filed a FIRST AND FINAL

ACCOUNT AND REPORT OF EXECUTOR AND PETITION FOR APPROVAL OF ACCOUNT AND REPORT; AND FOR DISCHARGE OF PERSONAL REPRESENTATIVE and setting hearing for July 17, 2001 at 8:30 a.m. in Department 2. (CT 91-105)

Respondents first and final account and report was made six (6) years, four (4) months and thirteen (13) days *"after"* Judge Garbolino had ordered respondent to file an inventory and appraisal within ninety (90) days of the February 7, 1995 hearing. (RT 7 L. 1-26)

On October 28, 1994, respondent had estimated the character and value of the estate to be $140,000.00 (CT 1). On June 20, 2001 respondent submitted a first and final account and report of the inventory and appraisal of the Estate of Mary A. Zisk. *The respondent determined the total assets of the estate are now valued at zero ($0.00).* (CT 97)

ARGUMENT

Petitioners have been deprived of the constitutional requirement of notice and a right to be heard, with due process of law and equal protection and application of the law.

A reading of the short transcript of the July 17, 2001 hearing before the Honorable James D. Garbolino in the court of first instance (RT pg. 11 - 13) supports the conclusion of bias, prejudice, abuse of discretion and deprivation of a right to be heard.

> "MR. W. ZISK: William Zisk, objector, your Honor
>
> *THE COURT: Unfortunately, Mr. Zisk, you don't have standing to object to anything, not being a beneficiary under the will by having contested the will, and so I acknowledge that you're here. Thank you and nice to see. Your not going to say anything, sir.*" (RT 11 lines 18-23)

The purpose of the July 17, 2001 hearing before Judge Garbolino was to hear objections to the first and final account filed by respondent on June 20, 2001. Not only was William Zisk deprived of the ability to testify to his objections to the first and final account, but Judge Garbolino made a summary adjudication ruling on standing without notice or hearing.

The record verifies that petitioner William J. Zisk did not contest the will within the statutory 120 day period at the outset of the probate proceedings, which was six years prior to the July 17, 2001 hearing on the first and final account and report.

Probate Code, section 8800, subdivision (b), provides the inventory and appraisal *"shall"* be filed within four months of issuance of letters. On February 7, 1995, the Honorable James D. Garbolino ordered respondent to file an inventory

and appraisal within 90 days. Respondent failed to comply. On June 5 2001, the Honorable James D. Garbolino ordered respondent to show cause why the inventory and appraisal, has not or should not be filed. Respondent filed a *First and Final Account and Report* on June 20, 2001, six (6) years, four (4)months and thirteen (13) days *"after"* being ordered to do so. Pursuant to Probate Code, section 11050, if the personal representative does not file a required account, the court shall compel the account by punishment for contempt. Probate Code, section 12200, subdivision (a), provides, the personal representative *"shall"* petition for an order for final distribution within one year after the date of issuance of letters. Six years later respondent claimed nothing to distribute. The unreasonable delay by the personal representative in submitting the inventory and appraisal fraudulently deprived petitioners of the policy in favor of a fair adversary proceeding in which each party is provided an opportunity to fully present its case. *Estate of Justesen* 77 Cal. App. 4th 352 (1999)

Petitioners submit that in the court of first instance the reporters transcript during the hearing on November 22, 1994 before the Honorable J. Richard Couzens (RT 1-3) and the reporters transcript during the hearing on February 7, 1995 before the Honorable James D. Garbolino (RT 4-7) verifies that Respondent was not appointed Executor and the August 3, 1989 purported Lost Will of Mary A. Zisk was not admitted to probate. Petitioners submit that the clerks transcript on appeal contains prejudicial errors to the following:

(1) PROOF OF SUBSCRIBING WITNESS, filed on December 21, 1994 (CT 57-59)

(2) Probate Minutes, dated February 7, 1995 (CT 66)

(3) Order for Probate, filed on March 23, 1995 (CT 67-69)

(4) Order for Probate, dated April 5 1995 (CT 72-74)

(5) Order for Probate, filed on April 5, 1995 (CT 75-77)

(6) Letters (probate) filed April 5, 1995, (CT 78)

(7) PROOF OF MAILING OF ORDER FOR PROBATE, filed on April 13, 1995 (CT 79, 80) – (duplicated)

(8) FIRST AND FINAL ACCOUNT AND REPORT OF EXECUTOR AND PETITION FOR APPROVAL OF ACCOUNT AND REPORT; AND FOR DISCHARGE OF PERSONAL REPRESENTATIVE, filed on June 20, 2001 (CT 91-105)

During the entire course of the probate proceedings of the Estate of Mary A. Zisk, four probate hearings were held in Superior Court in Auburn, to wit:

November 22, 1994 before the Honorable J. Richard Couzens (RT 1-3)

February 7, 1995 before the Honorable James D. Garbolino (RT 4-7)

June 26, 2001 before the Honorable James D. Garbolino (RT 8-10)

July 17, 2001 before the Honorable James D. Garbolino (RT 11-13)

From the foregoing, petitioners submit that the excerpts from the clerks' transcripts as noted above contain prejudicial error on appeal and there is no record to support respondents contention that respondent was

appointed Executor of the purported decedents Will on February 7, 1995 or that the purported Will was admitted to probate.

Petitioners respectfully request an order from this Court to have a certified copy of the entire record on appeal forwarded to the Supreme Court in Washington D.C. to verify the foregoing. The docket entries in the California Supreme Court indicates that only one volume of the record was received from the Third District Court of Appeal, indicating exclusion of the volume of reporters transcripts on appeal having been sent to the California Supreme Court. See Appendix E.

CONCLUSION

Title 28 USC § 2106 [28 USCS § 2106] provides that "[t]he Supreme Court may vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, as may be just under the circumstances".

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

S/ John W. Zisk	S/ William J. Zisk
John W. Zisk	William J. Zisk
2 Tomahawk Ct.	205 Thomas Street
Novato, CA 94949	Roseville, California 95678
Tel. No. (415) 883-2580	Tel. No. (916) 782-2233
Petitioner Pro se	Petitioner Pro se

Dated: May 10, 2003

APPENDIX A

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)

Estate of MARY A. ZISK, Deceased.

DONALD R. ZISK, as Executor, etc.,
Petitioner and Respondent,

V.

WILLIAM J. ZISK et al.,
Objectors and Appellants

C039478
(Super.Ct.No. SPR-0567)

FILED
NOV 27 2002
COURT OF APPEAL -THIRD DISTRICT
DEENA C. FAWCETT
By_____Deputy

Appearing in propria persona, William J. Zisk and John W. Zisk appeal from the August 3, 2001, order approving the first and final account and report of Donald R. Zisk, the executor of the estate of Mary A. Zisk under a will dated August 3, 1989. Arguing that the court erred in overruling their objections, William and John seek reversal of the order, removal of Donald as personal representative, revocation of the letters testamentary, admission of a different will to probate, imposition of sanctions on opposing counsel, and a new hearing

before an "independent Judge" appointed by the Judicial Council.[1] We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Decedent Mary A. Zisk died in Roseville, California, on September 8, 1994. She was survived by four adult children: Donald, William, Edward J. Zisk, Sr., and Marion A. Krivanec.

Decedent executed two wills in 1989. The first, a holographic will dated July 29, 1989, read: "Last Will and Testament of Mary A. Zisk [.] For Donald Zisk Sr. 50 percent[.] For Edward Zisk Sr. 50 percent[.] [¶] To all my grandchildren $1000.00 each[.] To all my great grandchildren $500.00 each.

[¶] Anybody objecting to my requests is to get $1.00[.] [A]dministrator - Don Zisk Sr. [¶] Mary A. Zisk.

The second, typewritten and signed by the decedent and two witnesses, was dated August 3, 1989. The relevant provisions of that will read:

"SECOND: I intentionally make no provisions

[1] To avoid unnecessary confusion, we refer to the members of the Zisk family by their first names.

[2] Donald objects to portions of William and John's "FACTUAL SUMMARY," "STATEMENT OF THE CASE," "FACTUAL BACKGROUND HISTORY," and "FACTUAL PROCEDURAL HISTORY" that reference matters not part of the record in this appeal. The challenged factual and procedural summaries cite a declaration filed by William and his "CHRONOLOGIC INDEX OF DEEDS" to the real property located in Higganum, Connecticut. Even if ownership of the Connecticut property were an issue before the court in these probate proceedings, which it is not, William provided no documentary evidence to support the legal and factual conclusions set forth in the declaration and index of deeds. We therefore rely on the statement of facts and procedure set forth in Donald's brief.

for my son, WILLIAM J. ZISK, or my daughter, MARION A. KRIVANEC. [1]

. [1]

"FIFTH: I hereby give, devise and bequeath the sum of Five Hundred Dollars ($500.00) to each of my great-grandchildren, and the sum of One Thousand Dollars ($1,000.00) to each of my grandchildren.

"SIXTH: After the above gifts are made to my great-grandchildren and to my grandchildren, I hereby give, devise and bequeath the rest of my estate wheresoever situated, whether' real, personal or mixed, and over which I have testamentary disposition, to my two sons, EDWARD J. ZISK and DONALD R. ZISK, in equal shares or to their issue by right of representation.

"SEVENTH: I hereby nominate and appoint my son, DONALD R. ZISK, Executor of this Will, to serve without bond. . . ."

On October 28, 1994, Donald filed a petition for probate of decedent's will under the Independent Administration of Estates Act (Prob. Code, §§ 10400-10592) (IAEA). He requested that a typewritten copy of the August 3, 1989, will be admitted to probate, declaring that the original will had been lost. Alternatively, Donald sought admission to probate of the decedent's July 29, 1989, holographic will. Donald estimated the estate consisted of $140,000 in personal property.

William and Marion filed written objections to Donald's petition to administer the estate under the IAEA. In addition to citing Donald's conflict of interest, they questioned the authenticity of the 1989 wills. William and Marion also

requested special notice of all matters listed in Probate Code section 1250, subdivision (c).3

At the November 22, 1994, hearing, the parties agreed that Donald would serve as personal representative with "limited authority" under the IAEA. When William reiterated his objection to inclusion of the two 1989 wills, Donald's attorney explained that the objectors needed to file a will contest. "[T]hey have to do it in the proper format . . . . It's not in the form of contest. [T]hey have to do it properly, correct, because other people are entitled to be noticed. In fact, they've got to name all the other heirs. . ." The court granted the petition and appointed Donald special administrator with limited authority. The court informed William and Marion they needed "to proceed with the proper procedure as to the other objections [they] might have," and continued the matter for 60 days for that purpose. Neither William nor Marion filed a will contest.

During the February 7, 1995, hearing, William sought clarification regarding his motion to compel full disclosure of his mother's estate. The court explained that Donald had

[3] Probate Code section 1250, subdivision (c) provides:
"(c) Special notice may be requested of one or more of the following matters:
"(1) Petitions filed in the administration proceeding.
"(2) Inventories and appraisals of property in the estate, including any supplemental inventories and appraisals.
"(3) Objections to an appraisal.
"(4) Accounts of a personal representative.
"(5) Reports of status of administration."

4

"90 days to file an Inventory and Appraisal. And at that point in time -- if you don't think that it's complete, then at that point you make your objections." The court assured William that nothing would proceed before that time, and William would receive notice. Thereafter, the court issued the order for probate appointing Donald the personal representative and executor of decedent's will with limited authority, admitted the August 3, 1989, will to probate, and issued letters testamentary.

Over six years later, on June 20, 2001, Donald filed the final

inventory and appraisal, the first and final account and report of the executor, and petitions for approval of the account and report, and for discharge of the personal representative. The inventory and appraisal listed the single asset of the estate as: "Undivided one-third interest in the Mortgage note in the original principal sum of $183,333,32 dated May 23, 1991, executed by HIGH ST. ASSOCIATES, a Connecticut general partnership and ARCHITECTS EQUITY, INC., a general partner by STEVEN A. ROCCO, Its President, with no interest on said note on or before May 23, 1996. This note is secured by the real property commonly known as 106 High Street, Higgannum, Connecticut, containing approximately 32 acres." The appraised value of the note was $61,111.11. However, Donald also declared that the note had no value: "The secured promissory note which the decedent owned was secured by a second deed of trust on property located in Connecticut. There was substantial litigation involving this property[;] however the end result

5

was the holder of the first note and deed of trust apparently foreclosed on the property and there was a sale of the property and the proceeds from the sale were not sufficient to provide any net proceed *[sic]* to be paid to the estate of Mary A. Zisk."

William filed an order to show cause and objections to Donald's first and final account and report. His declaration traced title to the Connecticut property, attached his "CHRONOLOGIC INDEX OF DEEDS," and included copies of the complaints filed in his Connecticut action to quiet title to a portion of the Connecticut property.

John Zisk, a grandson of the decedent, also filed objections to the first and final account, alleging misconduct in Donald's handling of the $183,000 note and mortgage. Specifically, he asserted that Donald abused his authority as executor by extending the maturity date of the note for an additional five years with no interest payments, and by subordinating the first mortgage to a $1,025,000 improvement loan. John complained that Donald

acted without notice and court approval.

The court heard objections to the first and final account on July 17, 2001. It ruled William lacked standing to object, "not being a beneficiary under the will" or "having contested the will." The court acknowledged it had read John's paperwork. Thereafter, the court overruled John's objections, granted the request for closure of the estate, and discharged Donald as the personal representative.

This appeal ensued.

6

DISCUSSION

William's Standing to Appeal

Only an aggrieved party may appeal. (Code Civ. Proc., § 902; *Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 898.) An "aggrieved party" is "any person having an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment." *(Estate of Colton* (1912) 164 Cal. 1, 5.) The interest ""must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment."" *(County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.)

William states he was a beneficiary under the decedent's 1974 will. He therefore had standing to contest the 1989 wills Donald sought to admit to probate. *(Estate of Plaut* (1945) 27 Cal.2d 424, 428.) Opposing counsel briefly explained the procedure to William and Marion at the November 22, 1994, hearing, and the court continued the hearing to allow them to pursue the matter. It is undisputed that neither William nor Marion filed a will contest within the statutory period. (Prob. Code, §§ 8250, 8270.) Nor did William appeal from the appealable order admitting the August 3, 1989, will to probate. (Prob. Code, § 1303, subd. (b).)

William does not dispute that he was expressly disinherited by

decedent's August 3, 1989, will. For this reason, he was not prejudiced or otherwise aggrieved by the order approving Donald's first and final account and report as executor of that

will. We therefore conclude William lacks standing to appeal the August 3, 2001, order approving the executor's first and final account and report. The remainder of this opinion relates to John's claims of error.

II

John's Objections

John contends the court erred in overruling his objections to Donald's first and final account and report. We conclude there was no error, and therefore no basis for the remedies sought by John on appeal.

A. Donald's Authority Under the IAEA:

As we explained, the only asset in the estate was the decedent's one-third interest in a mortgage note in the original principal amount of $183,333.32. The note was dated May 23, 1991, and provided there was no interest due before

May 23, 1996. The note was secured by the Connecticut property.

In March 1995, Donald, as executor of decedent's estate, entered into an agreement extending the payment date to May. 23, 2001. In October 1996, he executed an agreement subordinating the estate's interest in the mortgage note to a $1,025,000 loan, note and mortgage in favor of Farmers & Mechanics Bank, again as executor of decedent's estate. John argues Donald's actions exceeded the limited authority conferred by the court under the IAEA by consenting to subordination of the note without court

approval.[4] We conclude Donald acted within his

statutory authority.

The IAEA represents the Legislature's "effort to simplify estate administration in California by reducing the amount of court involvement between the formal opening and closing of an estate, without causing undue risk to the beneficiaries or other interested parties." (1 Cal. Decedent Estate Practice (Cont.Ed.Bar 2002) § 9.1, p. 9-2.) The court may grant a personal representative "full authority" with all the powers granted under the IAEA (Prob. Code, § 10402), or "limited authority" with all the statutory powers except the power to:

- (a) Sell real property.
- (b) Exchange real property.
- (c) Grant an option to purchase real property.

§ (d) Borrow money with the loan secured by an encumbrance upon real property." (Prob. Code, § 10403.)

Donald's extension of the payment date and subordination of the mortgage note did not involve any of the powers listed in Probate Code section 10403. The Connecticut property was encumbered in 1991, before the decedent's death and Donald's appointment as personal representative.

The IAEA expressly states that a personal representative "has the power to extend, renew, or in any manner modify the

[4] The opening brief also argues Donald failed to give special notice of his actions to William and Marion. We need not address that question because there is nothing in the record to show that John requested special notice.

terms of an obligation owing to or in favor of the decedent or the estate." (Prob. Code, § 10554.) The two documents at issue here were executed by Edward and Donald. Donald signed individually and as the personal representative of the estate. We conclude Donald acted within his powers when he modified its terms.

John cites Probate Code section 10501, subdivision (a)(10) in

support of his argument Donald exceeded his limited authority. That section of the IAEA requires court supervision for an action involving "a debt or other obligation of the personal representative, or the attorney for the personal representative, owing to or in favor of the decedent or the estate." (Prob. Code, § 10501, subd. (a)(10).) The statute does not apply because the obligation at issue did not involve a debt owed to the estate by Donald or his attorney.

B. Allegations of Extrinsic Fraud:

Relying on *Estate of Sanders* (1985) 40 Cal.3d 607, John also claims Donald's conduct amounted to extrinsic fraud. However, John's objections to the first and final account and report contain no allegations of fraud. Accordingly, the issue is not properly before us on appeal. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.)

Even if we were to read John's objections broadly to include a claim of extrinsic fraud, we reject any claim of error. Statements in John's brief are not part of the record on appeal and may not be considered by this court unless supported

by the record. *(Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 23, fn. 1.)

C. Delay in Filing the Inventory and Appraisal:

Also without merit is John's claim that Donald's failure to file an inventory and appraisal within the statutory period prevented him from presenting his case to the court. John did, in fact, file objections to the first and final account and report filed by Donald on June 20, 2001. He specifically raised the discrepancy between the estimated value of the estate in October 1994 and the actual value of the estate listed in Donald's final account and report. John also appeared at the hearing held on July 17, 2001. He fails to explain how the delay otherwise prevented him from challenging the account and report.

In any event, John could have petitioned the court at any time in the six years following the Donald's appointment as personal representative to compel Donald to file the inventory and appraisal, or to obtain his removal. subds. (a) & (b).) This he did not do.

DISPOSITION

The order is affirmed.

CALLAHAN

We concur:

BLEASE _____, Acting P.J.

HULL _____, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Zisk v. Zisk et al.
3 Civil C039478
Placer County
No. SPR0567

Copies of the attached document have been sent to the individuals checked below:

The Law Office of
Tosh M. Yamamoto
7201 S. Land Park Drive
Sacramento, CA 95831

William J. Zisk
205 Thomas Street
Roseville, CA 95678

John W. Zisk
2 Tomahawk Court
Novato, CA 94949

Honorable James Garbolino
Judge of the
Placer County Superior Court
101 Maple Street
Auburn, CA 95603

APPENDIX B

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

Estate of MARY A. ZISK, Deceased.

DONALD R. ZISK, as Executor, etc.,

Petitioner and Respondent,

V.

WILLIAM J. ZISK et al.,

Objectors and Appellants

FILED

DEC 24 2002

COURT OF APPEAL -THIRD DISTRICT

DEENA C. FAWCETT

By_____Deputy

C039478

Placer County

No. SPR0567

BLEASE, Acting P. J.

BY THE COURT:

Appellants' petition for rehearing is denied.

Dated: December 24, 2002

cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Zisk v. Zisk et al.
3 Civil C039478
Placer County
No. SPR0567

Copies of the attached document have been sent to the individuals checked below:

The Law Office of
Tosh M. Yamamoto
7201 S. Land Park Drive
Sacramento, CA 95831

William J. Zisk
205 Thomas Street
Roseville, CA 95678

John W. Zisk
2 Tomahawk Court
Novato, CA 94949

Placer County Superior Court
101 Maple Street
Auburn, CA 95603

APPENDIX C

Court of Appeal, Third Appellate District - No. C039478

S112651

IN THE SUPREME COURT OF CALIFORNIA

En Banc

Estate of MARY A. ZISK, Deceased.

DONALD R. ZISK, as Executor etc.,

Petitioner and Respondent,

v.

WILLIAM J. ZISK et al.,

Objectors and Appellants.

Petition for review DENIED.

SUPREME COURT
FILED
FEB 11 2003
Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice

APPENDIX D

IN THE

Court of Appeal of the State of Califonia

IN AND FOR THE

THIRD APPELLATE DISTRICT

The Estate of MARY A. ZISK, Deceased.

DONALD R. ZISK, Executor, etc.,

Petitioner and Respondent,

v.

WILLIAM J. ZISK et al.,

Objectors and Appellants.

C039478

Placer County

No. SPR0567

REMITTITUR TO TRIAL COURT CLERK

I, DEENA C. FAWCETT, Clerk/Administrator of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached opinion, previously provided to the parties, is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

Respondent to recover costs on appeal

WITNESS my hand and the seal of the Court affixed at my office this 20th day of February 2003.

DEENA C. FAWCETT

Clerk/Administrator

By: S. GREEN

Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated:

Trial Court Clerk

By:

Deputy

Cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: Zisk v. Zisk et al.
3 Civil C039478
Placer County
No. SPR0567

Copies of the attached document have been sent to the individuals checked below:

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Novato, CA 94949

Placer County Superior Court
101 Maple Street
Auburn, CA 95603

APPENDIX E

Supreme Court

ZISK (MARY), ESTATE OF
Case Number S112651

Docket Entries (Register of Actions)

Date	Description	Notes
01/06/2003	Petition for review filed	by objectors/aplts William & John Zisk
01/08/2003	Received Court of Appeal record	one volume
02/11/2003	Petition for review denied	